IN THE

# Supreme Court of the United States

October Term, 1942.

No. [redacted] 132-133

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and ANCIB A. SMITH,

*Respondents,*

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

*Petitioner,*

vs.

BENJAMIN D. FENIMORE,

*Respondent.*

ABIGAIL STERNER,

*Respondent,*

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

*Petitioner,*

vs.

BENJAMIN D. FENIMORE,

*Respondent.*

## ANSWER OF RESPONDENT, BENJAMIN D. FENIMORE, THIRD-PARTY DEFENDANT, CONTRA PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MICHAEL A. FOLEY,
721 Western Saving Fund Bldg.,
Philadelphia 7, Pa.,
*Attorney for Third-Party Defendant, Respondent.*

Morris & Lyle, 817 Weightman Bldg., Phila. 2, Pa.

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**ANSWER OF RESPONDENT, BENJAMIN D. FENIMORE, THIRD-PARTY DEFENDANT, CONTRA PETITION FOR WRIT OF CERTIORARI.**

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Answer of Benjamin D. Fenimore, Respondent, Third Party Defendant, respectfully represents:

This is an answer to the petition of the Philadelphia Transportation Company for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania.

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## SUMMARY STATEMENT OF THE MATTER INVOLVED.

These are actions in trespass for damages arising out of a collision which occurred on the Industrial Highway between Philadelphia and Chester, in the Commonwealth of Pennsylvania, on July 12, 1946 at about 1:25 in the afternoon. Benjamin D. Fenimore was the operator of the automobile which was struck by a trolley of the Philadelphia Transportation Company. Benjamin John Fenimore, the driver's son, Mrs. Florence T. Smith and Mrs. Abigail Sterner were passengers in the automobile which was operated by Benjamin D. Fenimore. Actions were brought by the various plaintiffs for damages arising from the accident. Defendant, the Philadelphia Transportation Company, moved to sever the Action and then brought a Third Party Action in the cause wherein Florence T. Smith, John M. Smith and Abigail Sterner were plaintiffs against Benjamin D. Fenimore as Third Party Defendant.

The Actions were consolidated and tried together before Hon. T. Blake Kennedy and a jury. The case was submitted to the jury on specific questions. The jury assessed the damages, found the defendant's operator negligent and that

Benjamin D. Fenimore was not negligent. Judgments were entered on the findings.

Defendant filed alternative motions for Judgment N. O. V. or new trial as to plaintiffs, and as third party plaintiff filed similar motions with respect to its claim for contribution against third party defendant. All motions were denied. An appeal was taken to the United States Court of Appeals for the Third Circuit. The judgments of the lower court were affirmed. This petition followed.

## QUESTION PRESENTED.

Does the mere happening of a collision between a motor vehicle and a trolley car at an unmarked crossing in the open country on a great industrial highway require the Court to rule as a matter of law that the operator of the motor vehicle was contributorily negligent?

(*Negatived by the District Court and by the Court of Appeals for the Third Circuit.*)

## REASONS WHY WRIT SHOULD NOT BE ALLOWED.

The Respondent,. Third Party Defendant, feels that it is imperative that the Court view this request for certiorari in its proper light. In order to do so, and to fairly evaluate the merits of the Petitioner's request, it is necessary to understand not only the facts as they should be considered, but the controlling law of the State of Pennsylvania.

### A. Controlling Law.

It is admitted by the Respondent, Third Party Defendant, Benjamin D. Fenimore, that the law of Pennsylvania is the controlling law for the actions herein presented. It is also conceded that the United States District Court for the Eastern District of Pennsylvania is bound by the law of Pennsylvania as applied to the facts of the causes tried.

### B. Legal Principles Involved.

(1) *How shall the testimony be considered in the light of Defendant's and Third Party Plaintiff's Motions?*

In any consideration of a Motion for Non Suit, Binding Instructions, a Motion to Dismiss or for Judgment N. O. V., the law of Pennsylvania requires that the evidence shall be read in the light most advantageous to the party in whose favor the verdict has been rendered or its corollary, in the light most adverse to the litigant making such motion.

> "In considering a case on a rule for judgment for defendant non obstante veredicto, it is an established proposition that the testimony must be read in the light

most favorable to the plaintiff and the plaintiff must be given the benefit of every fact and inference of fact which may be reasonably deduced from the evidence."

MORIN v. KREIDT, 310 Pa. 90, 96 (1933), 164 A. 799.

Petitioner complains that the Respondent, third party defendant, was guilty of contributory negligence, but the Supreme Court of Pennsylvania in the case of *Cramer v. Aluminum Co.*, 239 Pa. 120, 86 A. 654 (1913), at page 125 said:

> "Where the issue of contributory negligence has been submitted to the jury, a finding in favor of the plaintiff will not be set aside unless, upon a review of the evidence in the light most favorable to the plaintiff, it is inconceivable that a mind desiring only a just and proper determination of the question could reasonably reach any other conclusion than that the plaintiff had brought about or contributed to the injury by his own carelessness. That is, after determining all doubts and drawing all inferences in favor of the plaintiff, it must be clear that he was guilty of contributory negligence before it can be so ruled as a matter of law."

The Pennsylvania law not only requires the evidence to be viewed in the light most favorable to the party who has received the verdict, but goes further to add that

> "* * * all the facts and proper inferences of fact, which tend to sustain the plaintiff's contention, must be accepted as true, and all those to the contrary, if depending solely upon testimony, must be rejected."
>
> *Farley v. Ventresco*, 307 Pa. 441, 443, 444 (1932), 161 A. 534.

Even the Petitioner in this case will concede the foregoing to be a correct statement of the law by which his requests are to be judged and determined. Viewed in this light, he

has grossly departed from these principles. The facts as set forth in his Petition are not the evidence produced by the Respondent, Third Party Defendant, nor indeed are they the inferences that most strongly support the contention of the Respondent, Third Party Defendant, and the verdict of the jury. They are the exact opposite. At the very outset, he says "Visibility was good and the surface of the highway dry" and refers to the record. This is in direct conflict with the testimony supporting the contention of the Respondent, Third Party Defendant, which is to the effect that it had been raining and at the time of the accident it was drizzling or misty (64a and 82a). Again, the Petitioner says that the crossing was indicated by signs. Insofar as others than the Respondent, Third Party Defendant, were concerned, this might well be true, but it essentially misleading to the Court in this instance, as the testimony of Fenimore is to the effect that he had been traveling to the left of a large panel-body truck which obstructed the view of the signs on the right hand side of the road. Fenimore had traveled on the left hand lane of a two-lane highway at a distance of 1200 feet, prior to coming to this crossing, so that for all that distance he was unable to, and could not see any sign on his right. It is admitted that there were no signs showing a crossing that were posted or available on the left hand side of this one-way highway; so that for the purpose of this request, the reference of the Petitioner to the posting of signs is at the best, inapplicable and misleading. So far as this case is concerned, there were no signs showing a crossing.

Again, on page 3, Petitioners refer to the testimony that Fenimore was going 35 miles an hour for the 1200 feet. This is another of these misleading statements. True it is that such a statement may be found in the record, but in view of the verdict of the jury, Fenimore is entitled to the benefit of the most favorable testimony in the case and the Petitioner's counsel are only too well grounded in this knowledge. The case must be determined by the inferences and testimony most favorable to Fenimore. The favorable

inferences and testimony are that Fenimore was traveling at the back of a truck which was proceeding at the rate of 20 miles per hour (66a).

Again, the Petitioner would have the Court believe that Fenimore passed a standing truck and then went 45 feet before there was an accident. Fenimore testified that as soon as he passed the truck the accident occurred. The truck was stopped 10 feet from the nearest rail.

Without enlarging on further discrepancies and inaccuracies in the Petition of Defendant in failing to present the case in the light most favorable to the contention of Respondent, Fenimore, as Plaintiff and Third Party Defendant, as the Pennsylvania law requires, viewed in that light, the accident fairly can be said to have occurred as set forth in the following:

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## STATEMENT OF FACTS.

On July 12, 1946, about 1:25 P. M., Benjamin D. Fenimore was operating a 1946 Ford sedan westward from Philadelphia toward Chester along the Industrial Highway, a main thoroughfare consisting of two twenty-four (24) foot lanes paved with macadam and separated by a grass plot. At every crossing of the Industrial Highway from Philadelphia to Chester, there is either a stop sign against the street entering the Industrial Highway or a traffic light controlling the intersection (p. 113a). It was the first time Fenimore had ever travelled this road (p. 119a). The day was dull (p. 120a). It had been raining and at the time of the accident it was drizzling a little or was a little misty (p. 64a and p. 82a). The collision occurred at a point one-half mile south[west] of the nearest intersection (p. 115a). At this point the highway passes through swampland where water comes in at high tide (p. 65a). At the crossing the trolley tracks are flush with the highway and the trolley right of

way is the same color as the macadam highway (p. 112a). There was nothing to distinguish the tracks or the right of way from the highway. There were no warning signs or anything of that nature on the left side of the westbound lane to indicate a rail crossing at the site of the accident (p. 121a).

Fenimore was operating the Ford sedan in which the various other plaintiffs were riding. He had been following a truck which had a large solid paneled body at least nine feet high (p. 63a) which was travelling on the right hand side of the westbound lane. At a point about 1200 feet from the rail crossing, Fenimore pulled out from behind the truck into the left hand or passing lane of the westbound highway. He continued in a position with his right front wheel at or about at the left rear wheel of the truck (p. 120a) until the truck slowed down. There was nothing in front of Fenimore at this point to indicate a rail crossing. As far as he could see there was no interruption of, or change in, the macadam highway upon which he had been travelling. His view of the warning signs, which were placed on the right side of the highway only, was obstructed by the high paneled body of the truck. The truck came to a stop about ten (10) feet from the northernmost rail (pp. 83a-88a). Upon passing the truck, Fenimore was struck immediately by the trolley (p. 121a). The trolley was travelling at least 25 miles per hour (p. 84a) and did not decrease its speed approaching or entering the intersection (p. 82a). The trolley did not sound any warning of its approach (p. 85a).

(2) *Do the facts convict Respondent, Third Party Defendant, of negligence as a Matter of Law?*

**(a) What is negligence as defined by the Courts of the Commonwealth of Pennsylvania?**

Negligence in the want of care under the circumstances. It is the circumstances that beget the duties or obligations.

Negligence has been defined by the Pennsylvania Courts as "the absence of care according to the circumstances," *H. W. Ellis v. Lake Shore & M. S. R. Co.* (1891), 138 Pa. 506, 21 A. 140; Gress v. Ry. (1900), 14 Pa. Super. Ct. 87; as "the absence of care under the circumstances," *Gaussman v. Ry.* (1914), 55 Pa. Super. Ct. 542, 545; as the "want of ordinary care under the circumstances," *McCloskey v. Chautauqua Ice Co.* (1896), 174 Pa. 34, 34 A. 287; as "the want of care required by the circumstances," *Fredericks v. Atlantic Refining Co.* (1925), 282 Pa. 8, 13, 127 A. 615. See *American Law Institute, Restatement of the Law of Torts*, Section 282, Pennsylvania Annotations and the cases cited therein. As late as 1948 in *Mogren, et ux. v. Gadonas*, 358 Pa. 507, 58 A. 2d 150, the Supreme Court of Pennsylvania in an opinion by Mr. Chief Justice Maxey at page 511 has said "Circumstances alter cases" and again at page 512 "In passing on questions of negligence, courts and juries must consider the realities of the situation. The standard of carefulness is the conduct *under like circumstances* of an average reasonable person possessed of ordinary prudence.

The standard of care of a motorist or the operator of a trolley is defined in the much quoted case of *Galliano v. East Penn Elec. Co.*, 303 Pa. 498, 154 A. 805 (1931) in the following words at page 503:

> "It is the duty of the driver of a street car or a motor vehicle at all times to have his car under control, and having one's car under control means having it under such control that it can be stopped before doing injury to any person in any situation that is reasonably likely to arise under the circumstances."

In this more confined definition of negligence, i. e., negligence of an operator of a motor vehicle or street car, the Court again requires examination of the circumstances of each case individually. As in the case of *Reidinger v. Lewis Jones, Inc., et al., Appellants*, 353 Pa. 298 (1946), 45 A. 2d 3, wherein the Court examined the facts and concluded that

they did not constitute a situation "reasonably likely to arise under the circumstances."

**(b) Was the question of negligence in this case one for the jury?**

It is clear that the circumstances surrounding each case must be carefully considered and no general statement concerning the superior rights of trolley cars nor the failure to see a grade crossing can be applied to all cases which come before the Courts of Pennsylvania. In *Kindt, Appellant v. Reading Company*, 352 Pa. 419, 43 A. 2d 45 (1945), the court stated (p. 423) that

> "If the driver of a car knows or has reason to believe that he is approaching a railroad crossing or a through thoroughfare he must, of course, 'stop, look and listen.' If he reasonably believes he is on a quiet country road far away from all traffic, he does not have to 'consciously listen' for warning signals. In the instant case the evidence satisfied both the court and the jury that these plaintiffs did not know or have adequate reason to know that they were about to cross a railroad. The degree of attentiveness to which the law holds them must be determined by that fact. If they were not chargeable with the knowledge of the presence of a railroad crossing, the duty to 'stop, look and listen' at that point was not cast upon them."

In spite of this clear statement of the law of Pennsylvania, the Petitioner avers on pages 9-10 of his petition that it has no application to the instant case. The Respondent, Third Party Defendant, did not know, nor had he reason to know, of the existence of a rail crossing at the point of the collision and therefore can not be charged with negligence as a matter of law for his failure to stop, look and listen at this point, nor his passing a slowing truck on what appeared to be a through highway in the middle of a swamp.

The question of his negligence was properly submitted to the jury which exonerated him of all blame.

## CONCLUSION.

Since the question of Respondent, Benjamin D. Fenimore's negligence was submitted to the jury and the jury found a verdict in his favor, this verdict cannot be overruled unless the court is convinced that there is no evidence to support the verdict. The Petitioner attaches importance to the opinion of the Honorable T. Blake Kennedy and of the Honorable Herbert F. Goodrich in stating their doubts as to the negligence of Fenimore. However, the law of Pennsylvania will not permit the verdict to be changed for mere doubt of the court in reviewing the case.

> "We agree that there was evidence from which *the jury could* have concluded that the plaintiff was negligent, but we do not agree that this conclusion is so irresistible that fair and sensible men could not differ as to it and that, therefore, plaintiff's negligence should be declared as a matter of law."
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> *Christ v. Hill Metal and Roofing Co.*, 314 Pa. 375, 171 A. 607 (1934), at page 380.
>
> "In other words, on a motion for judgment n. o. v., it is not for the court to determine whether or not the court would arrive at a verdict different from the verdict the jury arrived at, but whether or not there was evidence in the case that would negative the theory that the jury's verdict was founded merely upon a guess or conjecture."
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> *Guilinger v. Pennsylvania Railroad Co.*, 304 Pa. 140, 144 (1931), 155 A. 293.

It is respectfully submitted, therefore, that the facts of this case present a question of negligence distinguishable from all the cases cited by the Petitioner regarding negligence at grade crossings; that the question of the Respon-

dent, Third Party Defendant's negligence *under the circumstances* was properly submitted to the jury; that the verdict of the jury cannot and should not be disturbed under the laws of the Commonwealth of Pennsylvania.

This case was tried for a number of days in the United States District Court on the theory of negligence. Motions for a new trial and judgment N. O. V. were argued and dismissed and from these decisions an appeal was taken to the Court of Appeals for the Third Circuit. In every instance, the case was argued on its merits. It is only for the first time in the Petition to this Court, that there has crept into the case a suggestion of something that counsel feels is, at best, unsportsmanlike, not to give it a better deserved appellation.

It would be a reflection on this Court to assume that they would be interested in or influenced by any facts and circumstances not part of the record, and it does seem that the Petitioner might come to this Court with more grace, honesty and fairness if the following sentence, which is not in any measure supported by the evidence, were deleted from the Petition: "Under such circumstances it seems only proper that his insurance carrier should be required to assume his share of the damages."

WHEREFORE, it is respectfully requested that the Certiorari be refused.

MICHAEL A. FOLEY,
*Attorney for Third Party Defendant, Respondent.*